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DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Part 1010

RIN 1506-AB27

Imposition of Special Measure against FBME Bank Ltd., formerly known as the Federal Bank of the Middle East Ltd., as a Financial Institution of Primary Money Laundering Concern

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Proposed rule; re-opening of comment period and availability of supplemental information.

SUMMARY: On July 29, 2015, FinCEN issued a Final Rule imposing the fifth special measure against FBME Bank Ltd. (FBME), formerly known as the Federal Bank of the Middle East, Ltd., with an effective date of August 28, 2015. On August 27, 2015, the United States District Court for the District of Columbia granted FBME's motion for a preliminary injunction and enjoined the Final Rule from taking effect. On November 6, 2015, the Court granted the Government's motion for voluntary remand to allow for further rulemaking proceedings. FinCEN is hereby re-opening the Final Rule to solicit additional comment in connection with the rulemaking, particularly with respect to the unclassified, non-protected documents that support the rulemaking and whether any alternatives to the prohibition of the opening or maintaining of correspondent accounts with FBME would effectively mitigate the risk to domestic financial institutions.

DATES: Written comments on this document must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by 1506-AB27, by any of the following methods:

- *Federal E-rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Include 1506-AB27 in the submission.
- *Mail:* The Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Include 1506-AB27 in the body of the text. Please submit comments by one method only.
- Absent a sufficient showing that a submission warrants confidential treatment, comments submitted in response to this document will become a matter of public record. Therefore, you should generally only submit information that you wish to make publicly available.

Inspection of comments:

The public dockets for FinCEN can be found at www.Regulations.gov. Proposed and final rules published by FinCEN in the **Federal Register** are searchable by docket number, RIN, or document title, among other things, and the docket number, RIN, and title may be found at the beginning of the document. FinCEN uses the electronic, Internet-accessible dockets at [Regulations.gov](http://www.regulations.gov) as their complete docket; all hard copies of materials that should be in the docket, including public comments, are electronically scanned and placed in the docket. In general, FinCEN will make all comments publicly available by posting them on <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: The FinCEN Resource Center at (800) 767-2825.

SUPPLEMENTARY INFORMATION:

I. Regulatory Background

On July 22, 2014, FinCEN published in the Federal Register a Notice of Finding (NOF) in which the Director of FinCEN explained that reasonable grounds exist for concluding that FBME Bank Ltd. (FBME) is a financial institution of primary money laundering concern pursuant to Section 311 of the USA PATRIOT Act (Section 311),¹ which is codified at 31 U.S.C. 5318A. FinCEN's NOF identified two main areas of concern: (i) FBME's facilitation of money laundering, terrorist financing, transnational organized crime, fraud schemes, sanctions evasion, weapons proliferation, corruption by politically-exposed persons, and other financial crime; and (ii) FBME's weak anti-money laundering controls, which allow its customers to perform a significant volume of obscured transactions and activities through the U.S. financial system. Simultaneously with the issuance of the NOF, FinCEN also published in the Federal Register a related Notice of Proposed Rulemaking (NPRM) proposing the imposition of the fifth special measure available under Section 311 against FBME.² In particular, FinCEN proposed to prohibit covered U.S. financial institutions from opening or maintaining a correspondent account in the United States for, or on behalf of, FBME. On July 29, 2015, after considering comments from the public on these documents, and other information

¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Public Law 107-56.

² 79 FR 42486 (July 22, 2014) (RIN 1506-AB27).

available to FinCEN, including both public and non-public reporting, FinCEN published in the Federal Register a Final Rule imposing the fifth special measure as proposed in the NPRM, with an effective date of August 28, 2015.³

FBME filed suit on August 7, 2015 in the United States District Court for the District of Columbia and sought a preliminary injunction against the Final Rule. On August 27, 2015, the Court granted the motion for preliminary injunction and enjoined the Final Rule from taking effect.⁴ In its order, the Court found that FBME was likely to succeed on the merits of two of its claims: (i) that FinCEN provided insufficient notice of unclassified, non-protected information on which it relied during the rulemaking proceedings, and (ii) that FinCEN failed to adequately consider at least one potentially significant, viable, and obvious alternative to the special measure it imposed.⁵ On November 6, 2015, the Court granted FinCEN's motion for voluntary remand so that FinCEN may engage in further rulemaking to address the procedural issues identified by the Court in enjoining the Final Rule. Accordingly, FinCEN is issuing this document to solicit additional comment regarding the Section 311 rulemaking related to FBME. In addition, FinCEN is making available for comment the unclassified, non-protected material that FinCEN relied upon and intends to rely upon during the rulemaking proceeding.⁶ That unclassified, non-protected material is available at www.regulations.gov [Fincen-2014-0007]. Those comments previously submitted in connection with the rulemaking need not be resubmitted, as FinCEN will consider all

³ 80 FR 45057 (July 29, 2015) (RIN 1506-AB27).

⁴ FBME Bank Ltd. v. Lew, No. 1:15-cv-01270, 2015 WL 5081209 (D.D.C. Aug. 27, 2015).

⁵ *Id.* at *5.

⁶ As previously disclosed in the litigation involving the Final Rule, FinCEN notes that it does not intend to rely on three documents that were originally included in its administrative record supporting the NOF and NPRM: two were law enforcement sensitive documents and the other was mistakenly included.

comments received to date. In addition, if FinCEN decides to consider any additional unclassified, non-protected material other than that provided in the comments, such information will be added to www.regulations.gov [Fincen-2014-0007].

II. Proposed Imposition of the Fifth Special Measure

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Public Law 107-56 (the USA PATRIOT Act). Title III of the USA PATRIOT Act amends the anti-money laundering provisions of the Bank Secrecy Act (BSA), codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314, 5316–5332, to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Regulations implementing the BSA appear at 31 CFR chapter X. The authority of the Secretary of the Treasury to administer the BSA and its implementing regulations has been delegated to the Director of FinCEN.

Section 311 of the USA PATRIOT Act grants the Director of FinCEN the authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, foreign financial institution, class of transactions, or type of account is of “primary money laundering concern,” to require domestic financial institutions and financial agencies to take certain “special measures” to address the primary money laundering concern. The special measures enumerated under Section 311 are prophylactic safeguards that defend the U.S. financial system from money laundering and terrorist financing. FinCEN may impose one or more of these special measures in order to protect the U.S. financial system from these threats. To that end, special measures one through four, codified at 31 U.S.C. 5318A(b)(1–4), impose additional recordkeeping,

information collection, and information reporting requirements on covered U.S. financial institutions. The fifth special measure, codified at 31 U.S.C. 5318A(b)(5), allows the Director to prohibit or impose conditions on the opening or maintaining of correspondent or payable-through accounts for the identified institution by U.S. financial institutions.

Given FinCEN's finding that FBME is of primary money laundering concern, in the Final Rule, FinCEN imposed the fifth special measure's prohibition on the opening or maintaining of a correspondent account in the United States for FBME. In further evaluation of alternative measures pursuant to the Court's November 6, 2015 opinion and order, FinCEN is reopening the Final Rule to solicit additional comment. First, FinCEN seeks comment on whether any of special measures one through four under Section 311 with respect to covered U.S. financial institutions' activities involving FBME would be an effective alternative to mitigate the risk posed by FBME, as explained in the Notice of Finding. FinCEN also seeks comment on whether, pursuant to special measure five of Section 311, FinCEN should impose conditions, rather than a prohibition, on the opening or maintaining of correspondent accounts with FBME.

III. Request for Comments

FinCEN invites comments on all aspects of this rulemaking, including, but not limited to, the following:

1. The unclassified, non-protected information that FinCEN intends to rely upon during the rulemaking proceeding;⁷

⁷ FinCEN anticipates that certain confidential business information ("CBI") pertaining to FBME will not be made available. To the extent documents containing such CBI can be disclosed publicly in redacted form, they will be added to www.regulations.gov.

2. Whether any of special measures one through four under Section 311 with respect to covered U.S. financial institutions' activities involving FBME would be an effective alternative to mitigate the risk posed by FBME as explained in the Notice of Finding;

3. Whether, pursuant to special measure five of Section 311, FinCEN should impose conditions, rather than a prohibition, on the opening or maintaining of correspondent accounts with FBME as an effective alternative to mitigate the risk posed by FBME as explained in the Notice of Finding; and

4. Any material developments that have occurred with respect to FBME since the issuance of the NOF and NPRM on July 22, 2014, including whether reasonable grounds continue to exist for concluding that FBME is a primary money laundering concern.

IV. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” that will “describe the impact of the proposed rule on small entities.” (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. FinCEN previously provided information about the number and types of entities that would be affected by the earlier proposal to impose special measure five.⁸ FinCEN is restating that information in this document so that persons may comment on FinCEN’s proposed

⁸ 79 FR 42486, 42489 (July 22, 2014) and 80 FR 45057, 45063 (July 29, 2015).

certification concerning whether the imposition of any of the special measures would have a significant economic impact on a substantial number of small entities. As explained in more detail, the limited number of foreign banking institutions with which FBME maintains or will maintain accounts will likely limit the number of affected covered financial institutions to the largest U.S. banks, which actively engage in international transactions.

A. Estimate of the Number of Small Entities to Whom Any of Special Measures One Through Five Would Apply

For purposes of the RFA, both banks and credit unions are considered small entities if they have less than \$500,000,000 in assets.⁹ Of the estimated 7,000 banks, 80 percent have less than \$500,000,000 in assets and are considered small entities.¹⁰ Of the estimated 7,000 credit unions, 94 percent have less than \$500,000,000 in assets.¹¹

Broker-dealers are defined in 31 CFR 1010.100(h) as those broker-dealers required to register with the Securities and Exchange Commission (SEC). Because FinCEN and the SEC regulate substantially the same population, for the purposes of the RFA, FinCEN relies on the SEC's definition of small business as previously submitted to the Small Business Administration (SBA). The SEC has defined the term "small entity" to mean a broker or dealer that: (a) had total capital (net worth plus subordinated liabilities) of less than \$500,000 on the date in the prior fiscal year as of which its audited financial statements, were prepared pursuant to Rule 17a-5(d) or, if not required to file

⁹ *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, Small Business Administration Size Standards (SBA Jan. 22, 2014) [hereinafter *SBA Size Standards*].

¹⁰ Federal Deposit Insurance Corporation, *Find an Institution*, <http://www2.fdic.gov/idasp/main.asp>; *select* Size or Performance: Total Assets, *type* Equal or less than \$: "500000" and *select* Find.

¹¹ National Credit Union Administration, *Credit Union Data*, <http://webapps.ncua.gov/customquery/>; *select* Search Fields: Total Assets, *select* Operator: Less than or equal to, *type* Field Values: "500000000" and *select* Go.

such statements, a broker or dealer that had total capital (net worth plus subordinated debt) of less than \$500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business if shorter); and (b) is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this release.¹² Based on SEC estimates, 17 percent of broker-dealers are classified as “small” entities for purposes of the RFA.¹³

Futures commission merchants (FCMs) are defined in 31 CFR 1010.100(x) as those FCMs that are registered or required to be registered as a FCM with the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act (CEA), except persons who register pursuant to section 4f(a)(2) of the CEA, 7 U.S.C. 6f(a)(2). Because FinCEN and the CFTC regulate substantially the same population, for the purposes of the RFA, FinCEN relies on the CFTC’s definition of small business as previously submitted to the SBA. In the CFTC’s “Policy Statement and Establishment of Definitions of ‘Small Entities’ for Purposes of the Regulatory Flexibility Act,” the CFTC concluded that registered FCMs should not be considered to be small entities for purposes of the RFA.¹⁴ The CFTC’s determination in this regard was based, in part, upon the obligation of registered FCMs to meet the capital requirements established by the CFTC.

For purposes of the RFA, an introducing broker-commodities dealer is considered small if it has less than \$35,500,000 in gross receipts annually.¹⁵ Based on information

¹² 17 CFR 240.0-10(c).

¹³ 76 FR 37572, 37602 (June 27, 2011) (the SEC estimates 871 small broker-dealers of the 5,063 total registered broker-dealers).

¹⁴ 47 FR 18618, 18619 (Apr. 30, 1982).

¹⁵ SBA Size Standards at 28.

provided by the National Futures Association (NFA), 95 percent of introducing brokers-commodities dealers have less than \$35.5 million in Adjusted Net Capital and are considered to be small entities.

Mutual funds are defined in 31 CFR 1010.100(gg) as those investment companies that are open-end investment companies that are registered or are required to register with the SEC. Because FinCEN and the SEC regulate substantially the same population, for the purposes of the RFA, FinCEN relies on the SEC's definition of small business as previously submitted to the SBA. The SEC has defined the term "small entity" under the Investment Company Act to mean an investment company that, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year.¹⁶ Based on SEC estimates, 7 percent of mutual funds are classified as "small entities" for purposes of the RFA under this definition.¹⁷

B. Special Measures One Through Five

As noted above, 80 percent of banks, 94 percent of credit unions, 17 percent of broker-dealers, 95 percent of introducing brokers-commodities, zero FCMs, and 7 percent of mutual funds are small entities. The limited number of foreign banking institutions with which FBME maintains or will maintain accounts will likely limit the number of affected covered financial institutions to the largest U.S. banks, which actively engage in international transactions. Thus, the imposition of the recordkeeping, information collection, or reporting provisions in any of special measures one through four would not impact a substantial number of small entities. Similarly, the imposition of

¹⁶ 17 CFR 270.0-10.

¹⁷ 78 FR 23637, 23658 (April 19, 2013).

the prohibition on maintaining correspondent accounts for foreign banking institutions that engage in transactions involving FBME under the fifth special measure, together with related notice and special due diligence, would not impact a substantial number of small entities. Finally, imposing conditions on the opening or maintenance of such a correspondent account under special measure five would not impact a substantial number of small entities.

C. Certification

For these reasons, FinCEN certifies that the proposals contained in this rulemaking would not have a significant impact on a substantial number of small businesses.

FinCEN invites comments from members of the public who believe there would be a significant economic impact on small entities from the imposition of any of special measures one through five.

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